

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

CHIKE OKAFOR

No. C 14-1002 LB

Plaintiff,

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE A
MOTION FOR RECONSIDERATION**

v.

UNITED STATES OF AMERICA,

[Re: ECF No. 23]

Defendant.

INTRODUCTION

Plaintiff Chike Okafor filed a Motion for Return of Property under Rule 41(g) of the Federal Rules of Criminal Procedure, the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), and the Due Process clause of the Fifth Amendment, regarding the administrative forfeiture by the Drug Enforcement Administration ("DEA") of \$99,500 in United States currency seized from Plaintiff. ECF No. 1. The government opposed the motion and moved to dismiss for lack of jurisdiction. ECF No. 14. Following a hearing on July 3, 2014, the court denied the government's motion to dismiss for lack of jurisdiction, but also denied the Plaintiff's motion for return of property. Plaintiff has now filed a motion for leave to file a motion for reconsideration. ECF No. 23.¹ For the reasons

¹ Citations are to the Electronic Case File ("ECF") with pin cites to the electronically-generated page numbers at the top of the page.

1 set forth below, the court denies the motion.

2 **STATEMENT**

3 **I. FACTUAL ALLEGATIONS**

4 On April 4, 2013, DEA agents at San Francisco International Airport seized \$99,500 from
5 Plaintiff's carry-on bag after a trained narcotics canine alerted to the cash, and following a search to
6 which he consented. By Notice bearing a mailing date of May 1, 2013, the DEA informed Plaintiff
7 that the \$99,500 had been seized and was subject to forfeiture pursuant to 21 U.S.C. § 881 because
8 the property was used or acquired as a result of a violation of the Controlled Substances Act. *See*
9 Rashid Decl. Ex. 2, ECF No. 12. The Notice provided Plaintiff with a deadline of June 5, 2013 by
10 which to file a claim contesting the forfeiture. *Id.*

11 Plaintiff's counsel David Michael submitted a declaration in support of Plaintiff's motion
12 declaring under oath that on June 4, 2013, he personally delivered a FedEx envelope containing
13 Plaintiff's administrative claim, along with a cover letter that he had drafted, to the FedEx office on
14 Shattuck Avenue in Berkeley, California. *See* Michael Decl. ¶ 3, ECF No. 3. He asserts that he
15 delivered the envelope before the 5:15 p.m. deadline on June 4, 2013 for delivery before 10:30 a.m.
16 on June 5, 2013. *Id.*; *see also* FedEx priority overnight airbill, Michael Decl. Ex. B. (dated "May 4,
17 2013" and stamped received by the DEA on June 6, 2013). The airbill does not have any markings
18 on it that show when or where it was actually received by the FedEx office or even which office
19 received it.

20 Plaintiff also provided the court with a printout of the tracking information for this envelope
21 available on the FedEx website. *Id.* Ex. L. This printout shows that the envelope was picked up on
22 June 5, 2013 at 4:49 p.m. at Emeryville, CA. The envelope was delivered to the DEA on June 6,
23 2013, at 9:03 a.m., after the June 5, 2013 deadline. *Id.* On June 13, 2013, the DEA sent a letter to
24 Plaintiff's counsel stating that the claim was untimely and offered Plaintiff twenty days to file a
25 Petition for Remission and/or Mitigation. *See* Michael Decl. Ex. C, ECF No. 3. As part of the
26 motion for return of property, Plaintiff's counsel Michael stated in his declaration that "I have
27 reviewed this delivery with FedEx and they, mysteriously, only trace the package back to the
28 Emeryville processing center and lose track of its location prior to that time." *Id.* ¶ 3. He concluded

1 that “it is obvious to [him] that, for some reason, the package was lost or misplaced in the Berkeley
2 drop-off office on 4 June 2013, and inadvertently found in the Emeryville processing center the next
3 day, which accounts for its delivery to DEA on 6 June, 2013.” *Id.*

4 **II. PROCEDURAL HISTORY**

5 Plaintiff filed the motion for return of property and counsel’s supporting declaration on March 4,
6 2014. ECF Nos. 1, 3. On May 15, 2014, the government filed a single pleading which was both a
7 Motion to Dismiss for Lack of Jurisdiction and an Opposition to Plaintiff’s Motion for Return of
8 Property. *See* ECF No. 14. Plaintiff filed a Reply on May 20, 2014. ECF No. 15. The government
9 filed a Reply on June 5, 2014. ECF No. 16.

10 The court held a hearing on July 3, 2014. Counsel Michael was not in attendance, and Plaintiff
11 was represented by another attorney, Edward Burch, from the Michael law firm. At the hearing, the
12 court inquired as to whether there was any additional information that existed to supplement the
13 record relating to the late filing, and counsel for Plaintiff indicated that there was none.

14 The court then issued an order on July 3, 2014 finding that while the court had jurisdiction, the
15 factual record before the court did not support a finding of extraordinary circumstances justifying
16 equitable tolling. ECF No. 22.

17 On July 14, 2014, Plaintiff filed, pursuant to Civil Local Rule 7-9, a request for leave of court to
18 file a motion for reconsideration of this court’s prior Order of 7/3/2014, denying the government’s
19 motion to dismiss but also denying Plaintiff’s motion to return property.² The court ordered the
20 government to file a response to Plaintiff’s request, and the government did so on July 29, 2014.
21 ECF No. 27.

22 **ANALYSIS**

23 **I. LEGAL STANDARD**

24 Under Civil Local Rule 7-9(a), a party must seek permission from the court prior to filing a
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26

27 ² In his current Motion, Plaintiff now characterizes his prior Motion as a “Request for
28 Equitable Tolling of Statute by One Day.” *See* ECF No. 23.

1 motion for reconsideration. N.D. Cal. Civ. L.R. 7-9(a).³ In seeking permission from the court, the
2 moving party must specifically show:

3 (1) That at the time of the motion for leave, a material difference in fact or law exists
4 from that which was presented to the Court before entry of the interlocutory order for
5 which reconsideration is sought. The party also must show that in the exercise of
reasonable diligence the party applying for reconsideration did not know such fact or
law at the time of the interlocutory order; or

6 (2) The emergence of new material facts or a change of law occurring after the time
7 of such order; or

8 (3) A manifest failure by the Court to consider material facts or dispositive legal
arguments which were presented to the Court before such interlocutory order.

9 N.D. Cal. Civ. L.R. 7-9(b).

10 Even if the court grants a party leave to file a motion for reconsideration, reconsideration is only
11 appropriate in the “highly unusual circumstances” when (1) the court is presented with newly
12 discovered evidence, (2) the underlying decision was in clear error or manifestly unjust, or (3) there
13 is an intervening change in controlling law. *See School Dis. No. 1J, Multnomah County, Or. v.*
14 *ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). “No motion for leave to file a motion for
15 reconsideration may repeat any oral or written argument made by the applying party in support of or
16 in opposition to the interlocutory order which the party now seeks to have reconsidered.” N.D. Cal.
17 Civ. L.R. 7-9(c). “Unless otherwise ordered by the assigned Judge, no response need be filed and no
18 hearing will be held concerning a motion for leave to file a motion to reconsider.” N.D. Cal. Civ.
19 L.R. 7-9(d).

20 **II. APPLICATION**

21 As noted above, there are three possible bases for a court to grant leave for a motion for
22 reconsideration. Plaintiff makes no argument that there has been any change in the law since the
23 time of the hearing. Rather, Plaintiff’s request hinges primarily on his contention that there has been
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26 ³ Civil Local Rule 7-9(a) provides: “Before the entry of a judgment adjudicating all of the
27 claims and the rights and liabilities of all the parties in a case, any party may make a motion before a
28 Judge requesting that the Judge grant the party leave to file a motion for reconsideration of any
interlocutory order made by that Judge on any ground set forth in Civil L.R. 7-9 (b). No party may
notice a motion for reconsideration without first obtaining leave of Court to file the motion.”

1 a manifest failure by the court. The failure alleged is not that the court failed to consider material
 2 facts, as the court did consider all of the facts before it, but instead is that the court did not accord
 3 the “facts” that Plaintiff deems material and “undisputed” sufficient weight.

4 Plaintiff asserts that “the government did not dispute the facts alleged in Plaintiff’s moving
 5 papers” and therefore this court was “mandated” to accept the “undisputed facts” presented by
 6 Plaintiff as both true and in a light most favorable to Plaintiff. This argument misconstrues the
 7 procedural posture of the case, the case law, and the nature of the “facts” presented to the court.

8 Plaintiff argues that the court “failed to put the government to its summary judgment burden”
 9 and that it also “failed to construe [Plaintiff’s allegedly] undisputed facts ‘in a light most favorable
 10 to the nonmoving party.’” Plaintiff cites *Stapley v. Pestalozzi*, 733 F.3d 804, 809 (9th Cir. 2013);
 11 *United States v. Ibrahim*, 522 F.3d 1003 (9th Cir. 2008); and *Kardoh v. U.S.*, 572 F.3d 697, 702 (9th
 12 Cir. 2009).⁴

13 In making this argument, Plaintiff misconstrues the procedural posture of the case. In lieu of a
 14 simple opposition to Plaintiff’s Motion for Return of Property, the government had filed a Motion to
 15 Dismiss for Lack of Jurisdiction and an Opposition, both of which rested on the proposition that this
 16 Court did not have jurisdiction to hear the matter. The government’s argument rested on the
 17 undisputed fact that Plaintiff had received adequate notice of the forfeiture proceeding. While in
 18 certain circumstances the Ninth Circuit has treated the opposition of the United States to a motion
 19 for return of property as a Rule 12(b)(6) motion for failure to state a claim or a motion for summary
 20 judgment, those cases are inapposite as in those cases there was a factual dispute as to whether
 21 Plaintiff received notice of the forfeiture.⁵ See *Ibrahim*, 522 F.3d at 1003; *United States v. Ritchie*,

23 ⁴ The Court notes that Plaintiff relied on two of these same cases, *United States v. Ibrahim*,
 24 522 F.3d 1003 (9th Cir. 2008) and *Kardoh v. United States*, 572 F.3d 697 (9th Cir. 2009) in his prior
 25 pleadings and that the new cases he has cited, *Stapley v. Pestalozzi*, 733 F.3d 2013) (9th Cir. 2013),
 was available at the time of the original hearing and is also inapposite.

26 ⁵ The government additionally argues that its Motion to Dismiss and Opposition would have
 27 had to have been treated as a motion to dismiss under Rule 12(b)(1), rather than a Rule 12(b)(6)
 28 motion. The Court concurs that there is no basis for converting a Rule 12(b)(1) motion into a motion
 for summary judgment.

1 342 F.3d 903 (9th Cir. 2003).

2 That is not the case here. There has never been any dispute as to the material facts that Plaintiff
3 received adequate notice of the forfeiture, and that Plaintiff's claim to the DEA was untimely.

4 Moreover, as a procedural matter, this court denied the government's Motion to Dismiss.

5 Procedurally then, what the court was left with was Plaintiff's request that the court exercise its
6 equitable jurisdiction to toll the time period for receipt of his administrative claim. Plaintiff has
7 acknowledged as much, as this is now the way he refers to his original motion. *See* Motion For
8 Leave at 1.

9 As noted in the prior order, the decision to exercise equitable jurisdiction is highly discretionary
10 and must be exercised with caution and restraint. *United States v. Eubanks*, 169 F.3d 672, 674 (11th
11 Cir. 1999). This court gave careful consideration to the facts before it. The undisputed facts
12 included the following: the Plaintiff had timely and adequate notice of the forfeiture; his
13 administrative claim was untimely received; and FedEx records indicate that the envelope
14 containing the administrative claim was received by them on a date that was untimely. Plaintiff's
15 counsel argues that the only "material fact," and the one that this court should have elevated above
16 all the others, was Plaintiff counsel's declaration that the FedEx records are inaccurate, as he
17 declares that he timely delivered the package to FedEx in Berkeley.

18 At the hearing, the court solicited from Plaintiff's counsel whether there was anything more he
19 wished to add to the factual record. There was nothing. Moreover, the only additional "facts"
20 counsel has presented to the court now by way of his Motion for Leave are that he does not know
21 where the Emeryville FedEx office is, and that he did not attend the motion hearing personally
22 because he chose to attend a wedding out of town. Counsel also outlines for the benefit of the court
23 his expertise in the field of asset forfeiture.⁶

24
25 ⁶ Where a critical administrative deadline is at play, experienced counsel must be aware of
26 the risks in waiting to file something at the last possible minute, when there is no window for error
27 on anyone's part. The court carefully considered all the facts, including Mr. Michael's account of
28 them. The only issue was whether those facts supported equitable tolling, and the court concluded
that they did not.

1 As discussed in detail above, Plaintiff has not demonstrated that there was a manifest failure by
2 the court to consider the material facts before it, and therefore there is no basis for a Motion for
3 Reconsideration.

4 **CONCLUSION**

5 Based on the foregoing, Chike Okafor's Motion for leave to file a motion for reconsideration is
6 **DENIED.** This disposes of ECF No. 23.

7 **IT IS SO ORDERED.**

8 Dated: September 26, 2014


LAUREL BEELER
United States Magistrate Judge